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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 262

LORRAINE WILSON AND HULDAH DIEKMANN,
Petitioners,
Appellants below,

vs.

VAN VECHTEN SHAFFER, DON BARNES,
ARTHUR BARLOW, FRANK BYERS,
THE SHORES COMPANY, a corporation, and
SHORES-MUELLER COMPANY, a corporation,
Respondents,
Appelles below.

BRIEF OF VAN VECHTEN SHAFFER, ET AL., RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 141 Federal (2) 877.

STATEMENT OF THE CASE

This is a suit in equity brought in the United States District Court for the Northern District of Iowa by Petitioners and others as stockholders of the Shores-Mueller Company against Respondents who were its officers and directors to seek redress for certain alleged wrongs of the officers and directors in the operation, receivership and conversion of the assets of the corporation.

The Petitioners also made the Shores-Mueller Company and The Shores Company Defendants in the suit and averred that The Shores Company claimed some interest in the assets of the Shores-Mueller Company.

The petition alleges all of the facts which would entitle the Shores-Mueller Company to recover as if it were a stockholders' suit on behalf of the corporation.

An affidavit filed by Edward J. Dahms, one of the attorneys for the Plaintiffs in this cause, in support of a motion for production, impounding, inspection, and copying of documents and records, stated: "the above action is in one of its aspects a derivative action for the use and benefit of the Shores-Mueller Company "

Petitioners state in their petition that they bring the suit on behalf of themselves and all other stockholders of the Shores-Mueller Company who may choose to participate in the suit and contribute to the expenses.

The prayer is to have a trust declared for the benefit of the Plaintiff and other stockholders of the corporation and that the Defendants render an accounting and for general equitable relief. (R. pages 1-8.)

The District Court dismissed the petition holding that the action as to the petitioners was adjudicated adversely to them in the prior suit referred to herein as No. 41. It was stipulated by the parties in the record that the Court could

consider the entire record in No. 41 as if offered in evidence in this cause. (R. page 21, line 22.)

No. 41 was a suit brought by the petitioners and others against the Respondents herein. The Petitioners in No. 41 alleged that they brought the suit in the right of the Shores-Mueller Company as stockholders thereof and also for themselves as individual stockholders entitled to the assets of the corporation if the corporation's charter had been forfeited or cancelled. The allegations of the petition in No. 41 are substantially the same as the allegations in this action, except for the greater emphasis placed upon fraud in No. 41. The prayer in No. 41 is that the petitioners have judgment against the Defendants, but that if the Shores-Mueller Company is in existence and has the cause of action instead of the Petitioners that relief be given to the Shores-Mueller Company which the Petitioners would participate in as stockholders. The District Court dismissed the petition on the ground that the cause of action was barred by the Iowa Statutes of Limitation. (Wilson vs. Shores-Mueller Company, 40 Fed. Supp. 729.)

When the Petitioners herein came back in the District Court with the petition in this case, the trial court found that it was the same cause of action, only slightly different verbage, and that the Petitioners having failed to appeal in the first case were bound by the prior adjudication. (50 Fed. Supp. 103.) It does not affirmatively appear in the record whether the charter of the Shores-Mueller Company had been forfeited or cancelled or not. The petition in this case alleges the existence of a corporation which would give the petitioners only the same derivative rights which they alleged in No. 41.

The Petitioners herein did not stay the case in the Court below but an amended complaint has been filed in the trial court. An application to produce documents has been filed

and the cause is proceeding. The Petitioners have, therefore, waived their right to petition for certiorari.

Exception is taken to the allegation in the Petitioners' "Summary Statement of Matter Involved" that the complaint in this case alleges only a primary class suit and that in No. 41 only a derivative claim was alleged.

ARGUMENT

Summary of the Argument

POINT A. The Petitioners having sought the relief to which they were entitled as stockholders of the Shores-Mueller Company either directly or through the Shores-Mueller Company in the cause entitled Lorraine Wilson vs. Shores-Mueller Company, et al., referred to herein as No. 41, and the matter having been adversely adjudicated to them therein, the Circuit Court of Appeals for the Eighth Circuit in this cause correctly determined that the prior adjudication was binding upon the petitioners when they allege the same factual situation and pray for the same relief in this case.

POINT B. The decision of the Circuit Court of Appeals for the Eighth Circuit in this case was upon a factual matter and not a matter of the character in which certiorari will be granted.

POINT C. The Circuit Court of Appeals did not decide an important question of general or federal law probably in conflict with applicable local and federal decisions, but decided a factual matter under Iowa law of interest only to the litigants in this case.

POINT D. The decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals.

POINT E. Petitioners are bound by the ruling in No. 41 on not only every issue presented therein, but every issue that could have been presented.

Point A

The petitioners having sought the relief to which they were entitled as stockholders of the Shores-Mueller Company either directly or through the Shores-Mueller Company in the cause entitled Lorraine Wilson vs. Shores-Mueller Company et al., referred to herein as No. 41, and the matter having been adversely adjudicated to them therein, the Circuit Court of Appeals for the Eighth Circuit in this case correctly determined that the prior adjudication was binding upon the petitioners when they allege the same factual situation and pray for the same relief in this case.

There is nothing in the petition inconsistent with a derivative or secondary suit and the petitioners do not change the character of their action by alleging that they bring the suit on behalf of themselves and all other stockholders of the Shores-Mueller Company. The petitioners are seeking to enforce their rights, whatever they are, through the corporation or individually, if the corporation is without rights in the premises.

The complaint in No. 41 alleged that the Defendants stood in a fiduciary relation to the Plaintiffs; that they had in that fiduciary capacity taken control of the entire property of the Shores-Mueller Company and converted the same to their own use and benefit; that they had transferred the property and assets to the Shores Company and constituted themselves directors and officers; that the Plaintiffs had contributed to the payment of attorney fees and costs, and various actions were commenced by various stockholders in behalf of themselves and all other stockholders but that

none of said actions were properly brought nor the proper remedy sought and these Plaintiffs, at the request of numerous other stockholders, brought this action and that only through an action in equity can an accounting be had and these Plaintiffs be afforded complete relief herein; then they pray for judgment against the Defendants for all the amounts unlawfully converted aforesaid and that the Shores-Mueller Company recover of the other defendants the amounts found due and in the event it be found that the Shores-Mueller Company has no legal status as a corporation, that these Plaintiffs have for themselves, and all other stockholders who may join in this action, an accounting and judgment and decree in such amount as will equal the value of the real estate, assets, good will and rents, issues and profits derived from the ownership and control of the Shores-Mueller Company as converted by the Defendants and to which the Plaintiffs herein are entitled as stockholders of said corporation, and for such other and further relief as may be just and equitable in the premises. (Record page 32.)

These allegations from a legal standpoint and the remedy sought justify the factual findings and decision of the District Court and the Circuit Court of Appeals.

Point B

The decision of the Circuit Court of Appeals for the Eighth Circuit in this case was upon a factual matter and not a matter of the character in which certiorari will be granted.

In the opinion of the Circuit Court of Appeals for the Eighth Circuit they stated:

> "There remains the res judicata question as to two of the plaintiffs. On that issue, we must affirm the holding of the District Court. The complaint in the previous

action, just as the one here, sought to impose a *constructive trust* against acts done by the defendants while they were officers and directors of the corporation. While the fraud and collusiveness of their actions were directly alleged, their status as officers and directors was also specifically stated. Just as in the present suit, therefore, jurisdiction *could have rested either on actual fraud or on violation of fiduciary relationship and duty.* The holding that the situation was required to be treated as one for relief on the ground of fraud, and so was barred, was, as in the present case, on the facts shown by the complaint, an inherent adjudication by the district court that the limitation provision which the court applied could not be escaped on the theory of violation of *fiduciary relationship and duty.* Plaintiffs had the same remedy open to them by an appeal in that case as in the present one. They accepted the dismissal and its adjudicatory effect. They thereby lost the right to litigate further against defendants their claim for a direct personal interest in the constructive trust property on the basis either of fraud or of violation of fiduciary relationship and duty. Restatement, Judgments, Sec. 49, Comment a; Northern Pac. Ry. Co. vs. Slaght, 205 U. S. 122, 131, 26 S. Ct. 442, 51 L. Ed. 738; Cooley v. Maine, 183 Iowa 560, 165 N.W. 1015, 1016. What might be the situation as to their rights, if a recovery of assets should be decreed in favor of the old corporation, we need not now consider."

It will be observed from the foregoing that both the District Court and the Circuit Court of Appeals for the Eighth Circuit construed the pleadings filed in the instant case and in Cause No. 41 as actions asserting the same rights of the stockholders arising out of the same factual situation.

This Court on certiorari will not review a question of mixed law and fact upon the decision of which the whole case turns.

> Chicago, Burlington & Quincy Railway Co. vs. Williams, 205 U. S. 446, 51 L. Ed. 875.

In the case of United States vs. Mayer, 235 U. S. 55, 59 L. Ed. 129, Chief Justice Hughes said:

> "It is a familiar rule that this Court cannot be required through a certificate under Section 239 to pass on questions of fact or mixed questions of law and fact."

> See also Cleveland-Cliff Iron Co. vs. Artic Iron Co., 284 U. S. 178; 63 L. Ed. 198.
> California Artificial Stone Paving Co. vs. Molitor, 113 U. S. 609, 28 L. Ed. 1106.

Point C

The Circuit Court of Appeals did not decide an important question of general or federal law probably in conflict with applicable local and federal decisions, but decided a factual matter under Iowa law of interest only to the litigants in this case.

The Court said in Ex parte Woods, 143 U. S. 202, 36 L. Ed. 125:

> "Whether the law of Minnesota that a judgment of dismissal is not a bar to a second suit for the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on

> the trial of a case, are not questions of such gravity and importance as to require the review by this court of the conclusions of the Circuit Court of Appeals in reference to them."

In the case of Pflueger vs. Sherman, 293 U. S. 55, 79 L. Ed. 193, the Court said:

> "It is not clear to the court whether this is a stockholders' suit or one on behalf of the individual complainants. * * * The certificate fails to conform to the requirements that questions submitted must be questions of law and not mixed questions of law and fact."

The certificate was dismissed.

Point D

The decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals.

The claim is made that the decision of the Circuit Court of Appeals in this cause is contrary to the decision of the Circuit Court of Appeals for the Second Circuit, on the same matter in the case of Bogert vs. Southern Pacific Company, 244 Fed. 61, affirmed on this issue by this Court, 250 U. S. 483, 490.

The Court in the Bogert case, in reference to the issues presented in the Supreme Court, said:

> "The Southern Pacific contends that adverse decisions in the earlier litigation are a bar either as an estoppel or by way of election of remedies; since the prosecution of some, if not all, of the earlier suits, also was actively supported, by the minority stockholders'

committee, and the plaintiffs are bound as privies to the full extent to which the decrees therein constitute res judicata. *But in none of these suits was the question here in issue decided.* Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it, or enjoin distribution of the stock according to its terms. The minority stockholders sought, when presenting the case in the court of appeals of New York (MacArdell v. Olcott, 189 N.Y. 368, 372, 373, 82 N.E. 161), to have declared the trust which was later decreed in this suit; but that court refused to consider the contention, for the reason that this claim to relief was based upon a theory 'widely at variance' with that upon which that action was commenced and tried. *Because of such wide divergence the earlier decrees do not operate as res judicata.*"

There was no divergence in this cause. The District Court made the following *Finding of Facts*:

(1) That the statements and allegations of the Complaint in this cause cover the same matter and restate and replead the matters alleged and set forth in the Complaint in the cause wherein Lorraine Wilson et al., are Plaintiffs, and the Shores-Mueller Company et al., are Defendants, No. 41 Civil.

(2) That the claims and matters set forth in said complaint in cause No. 41 Civil have been adversely adjudicated to the Plaintiffs therein by the decision of this Court entered on the 13th day of September, 1941, and that the Plaintiffs' petition for rehearing and for leave to amend therein was overruled

by this Court on the 10th day of October, 1941, and that no appeal has been taken or is pending from said rulings, orders, and decisions of this Court, and said rulings, orders and decisions of this Court became and are final.

And the following Conclusions of Law:

That as to all plaintiffs other than Thomas Liken, Dorothy Brauer and Grace L. Nystrom, the final judgment entered in Cause No. 41 Civil, is res judicata of all issues in this case. (Record page 30.)

The Bogert case having been decided under peculiar facts and being a fact case with many issues and being decided before recent decisions of this Court that local law is controlling, no question of conflict between or among the Circuit Courts of Appeal is involved herein.

These rulings were affirmed by the Circuit Court of Appeals.

See also: Ruhlin vs. New York Life Insurance Co., 304 U. S. 302, 83 L. Ed. 1290.

Point E

Petitioners are bound by the ruling in No. 41 on not only every issue presented therein, but every issue that could have been presented.

The ruling of the Court in Case No. 41 Civil is an adjudication of the rights of the Plaintiffs, Lorraine Wilson and Huldah Diekmann, in the case at bar.

In the case of Northern Pac. Ry. Co. vs. Slaght, 205 U. S. 122, 51 L. Ed. 739, the Court said:

> "It is well established that a judgment on demurrer is as conclusive as one rendered upon proof, Gould vs. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Bissell

vs. Spring Valley Twp. 124 U. S. 225, 31 L. Ed. 411, 8 Sup. Ct. Rep. 495."

The Court further said:

"The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated."

See also:

Hansberry vs. Lee, 31 U. S. 41, 43, 85 L. Ed. 27;
Plumb vs. Goodnow (Plumb vs. Crane) 123 U.S. 560;
Confectioners' Machinery & Mfg. Co. vs. Racine Machinery Co., 163 Fed. 914;
Bryant Electric vs. Marshall, 169 Fed 426;
Smith vs. Swormstedt, 16 How. U. S. 288; 14 L. Ed. 942;
Christopher vs. Brusselback, 302 U. S. 503 and cases cited;
Lee vs. School District, 149 Iowa 345, 128 N.W. 533;
Sovereign Camp of the Woodmen of the World, Petitioner, vs. William F. Bolin et al., 305 U. S. 66, 83 L. Ed. 45;
King vs. Realty Co., 107 Fed. (2) 90;
Waybright et al. vs. Columbian Mut. Life Ins. Co., 30 Fed. Supp. 885;
Purcell vs. Summers, 34 Fed. Supp. 421;
Dana vs. Morgan, 232 Fed. 85.

CONCLUSION

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and

that the petition for a writ of certiorari should be denied.

Dated August 21, 1944.

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